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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re ZION J., a Person Coming Under the Juvenile Court Law.	
ALAMEDA COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. LILLIE J., Defendant and Appellant.	A111895 (Alameda County Super. Ct. No. 177920)

Appellant Lillie J. (Grandmother) is the maternal grandmother of seven-year-old Zion J., a dependent child of the juvenile court. Grandmother contends that the juvenile court erred by (1) denying her petition for modification (Welf. & Inst. Code, § 388);[1] (2) denying her request for de facto parent status; and (3) granting the section 388 petition of respondent Alameda County Social Services Agency (Agency). We disagree and affirm.

I. FACTS

In mid-September 1999, Zion J. was born exposed to cocaine. On September 20, 1999, the Agency filed a dependency petition on his behalf. (§ 300.) After proceedings

[1] Subsequent statutory citations are to the Welfare and Institutions Code. Rule references are to the California Rules of Court.

on the petition, the juvenile court terminated the parental rights of Zion's mother and alleged father on May 5, 2000.

On November 3, 2001, Zion's maternal uncle, Roderick J., adopted Zion. Roderick already had custody of one of Zion's older half-siblings, D.M. The juvenile court terminated Zion's dependency proceedings because of the adoption. The record reveals that Zion had lived with Roderick since he was three months old and called him "daddy." Roderick was "the only family [Zion] could remember."

Zion's life was apparently uneventful until the year 2004.[2] Roderick died in February. Zion and D.M. went to live with Grandmother and their step-grandfather, Arthur B. (Grandfather). Four of Zion's and D.M.'s half-siblings—A..C., Larry C., Brian J., and Shaquille J.—were already living with the grandparents. Brian and Shaquille had been placed with the grandparents as a relative placement.

On November 16, the Agency learned that the grandparents were abusing Zion's half-siblings verbally, physically, and emotionally. The Agency learned that on November 14, the grandparents punished D.M., Brian, and Shaquille by making them stand outside on the porch in their pajamas from 9:00 to 11:00 p.m. Later that night, after their grandparents went to sleep, D.M. and Brian fled to the home of Mary Jane S., D.M.'s godmother. The police returned the two boys to the grandparents, but notified Child Protective Services (CPS). The boys disclosed an ongoing pattern of abuse, including excessive corporal punishment, to CPS social workers.

On November 19, the Agency filed a dependency petition on behalf of Zion, D.M., Larry, and A.C., alleging failure to protect from a substantial risk of serious physical harm (§ 300, subd. (b)), and sibling abuse (§ 300, subd. (j)). In addition to the pajama punishment incident, the dependency petition alleged that Grandfather strikes Larry and A.C. with a belt, leaving bruises; punches and slaps Brian and goads him to fight; and locks Brian out of the house several times a month. The petition alleged that Grandmother taunts D.M. by telling him he is gay and should wear a dress and high

[2] Subsequent dates are in 2004 unless and until otherwise indicated.

heels; calls A.C. a "black bitch"; and tells the children that nobody loves or wants them. Finally, the petition alleged that Zion was in danger of abuse or neglect due to the abuse of his siblings.

The Agency filed a supplemental petition (§ 387) on behalf of Brian and Shaquille. The supplemental petition alleged inappropriate discipline, mostly corporal, resulting in Brian's unwillingness to return home. The Agency sought to remove Brian and Shaquille from the grandparents' home and place them in a foster home.

On November 23, the juvenile court ordered all six minors detained, but authorized the Agency to return Zion, Shaquille, Larry and A.C. to the grandparents' home. The court admonished the grandparents to impose no corporal punishment.

The Agency filed a Jurisdictional and Dispositional Report on December 8. The Agency reported that the records of Roderick's probate proceedings showed that Grandmother was appointed the legal guardian of the *estates* of Zion and D.M., but was *not* appointed legal guardian of their *persons*. Grandmother was appointed guardian of the estates of the two minors for the purposes of withdrawing funds from a bank account for the minors' health and maintenance. The letter of guardianship is in the record and shows Grandmother was appointed guardian of the estate only. It was the Agency's "understanding that . . . [G]randmother is only the guardian of the minors' estate and therefore, there is no legal guardian of the person and no parent."

The Agency further reported that Roderick's best friend, Gregg B., was interested in adopting Zion as a "fictive kin" placement. Gregg had already adopted two of Zion's other siblings. Gregg was considered part of the family and is described as Zion's godfather. The report also stated that Zion, Shaquille, Larry and A.C. wanted to live with the grandparents, and that Zion and Shaquille were not punished with a belt. Grandmother was willing to accept services, including parenting classes.

In an addendum report of December 28, the Agency recommended that Zion, Larry and A.C. be found to be dependent children of the juvenile court, and "placed in-home" with the grandparents as a relative placement with a permanent plan of legal guardianship. The grandparents would be provided with family maintenance services.

The three minors told a social worker they were happy being with their grandparents and wanted to live with them.

On January 10, 2005, the juvenile court sustained the dependency petition as amended.[3] The court found that a permanent plan of legal guardianship of the person was appropriate for Zion, and placed him in Grandmother's home. But contrary to the assertion of Grandmother's opening brief the court did not appoint Grandmother the legal guardian of Zion.[4] Rather, the court scheduled a section 366.26 hearing (.26 hearing) for May 10 to finalize legal guardianship. And care, custody and control of Zion was retained by the Agency.

In her report for the .26 hearing, Agency child welfare worker Tasha Knighten noted that Grandmother "is interested in becoming Zion's legal guardian . . . ." But "in light of the recent removal of Zion and his siblings and the physical abuse by [Grandmother and Grandfather] on Zion's older siblings," Knighten wanted more time to evaluate Grandmother's ability to be Zion's legal guardian. Knighten noted that the grandparents "have been hostile" toward her and the Agency, "which makes working with them very difficult." Knighten planned to "continue to asses [the grandparents'] ability to become Zion's legal guardian[s], however, if that is not possible, [Knighten would] explore other options, such as Zion's godfather, Gregg B[.]'s interest in adoption."

On May 10 the court continued the .26 hearing until September 7. The court also ordered Grandmother to produce an accounting of the funds she had received on behalf of

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[3] Subsequent dates are in 2005 unless and until otherwise indicated.

The amended petition alleged the pajama punishment incident, and further alleged that Grandfather punches and slaps Brian and locks him out of the house; Grandfather disciplines Larry and A.C. by hitting them with a belt, leaving bruises; Grandmother disregards the minors' emotional needs and speaks to them derogatorily; and Zion is in danger of abuse or neglect due to the abuse of his siblings.

[4] Here and henceforth we use "legal guardian" or "guardian" in the sense of guardian of the person.

Zion and D.M. The court set a progress review hearing on July 8 to review the accounting.

In a memorandum report filed July 5, the Agency recommended that the appropriate permanent plan for Zion was adoption by Gregg and his domestic partner, Demetrius M., who are described as Zion's godparents. Gregg and Demetrius had already adopted a half-sibling of Zion, and were working to adopt another. The Agency noted that the godparents had a relationship with Zion since his infancy, and were willing and able to make a commitment to Zion.

The Agency did not recommend adoption of Zion by the grandparents because of the sustained dependency petition regarding physical abuse of Zion's half-siblings.

At the progress review hearing on July 8, after reviewing the financial accounting, the Agency asked the juvenile court to adopt its permanent plan recommendation, and asked for increased visitation with the godparents. Grandmother was present with counsel at the hearing. She objected to the Agency's recommendation and asked that the Agency be required to file a section 387 petition so that she could contest it. The trial court adopted the Agency's recommendations, and ordered increased visitation between Zion and his godparents and that Zion begin to transition into their home. But the trial court also ordered the Agency to file a section 387 petition so the grandparents could contest the recommendation.

The .26 hearing remained set for September 7. The Agency never filed a section 387 petition.

On July 21, the social services agency for Los Angeles County, where the godparents reside, reported to the child welfare worker that the godparents had been approved for a fictive kin placement.

On August 2, the Agency filed a section 388 petition, asking the juvenile court to modify its January 10 order for Zion's permanent placement with his grandparents by ordering a permanent plan for adoption by the godparents. The godparents' present willingness to adopt Zion, as well as his need for a stable family home, were advanced as changed circumstances justifying the modification. The Agency asked the court to

approve a permanent plan of adoption by the godparents and to maintain the .26 hearing on September 7 to finalize the permanent plan.

The Agency noted that Zion's counsel agreed with the proposed modification. There were "[n]o other counsel on the matter [because the] adoptive father is deceased and biological parental rights were previously terminated." In other words, the only parties to the matter were Zion and the Agency, and counsel for both were in agreement in favor of the modification.

The Agency noted that Grandmother opposed the modification, but had no standing—she was not a party to the action but only a relative foster-care placement. The Agency took the view, as set forth in the declaration of a child welfare worker, that the grandparents were no longer an appropriate placement due to their history of excessive and inappropriate abuse of Zion's half-siblings. It appears the grandparents were not served with the Agency's section 388 petition.

On August 12, the grandparents filed their own section 388 petition. They sought modification of the July 8 order for increased visitation between Zion and the godparents, and asked that the order be modified to return Zion to their custody.

As changed circumstances or new evidence to justify the modification, the grandparents listed the following: "1. The [A]gency never filed a [section] 387 petition to remove the minor from our home. 2. The child who is still officially placed in [our] home has been out of our home for over a month. 3. There is no basis to remove him from our home. 4. We have completed parenting classes and attended individual and family counseling."

In a brief statement attached to the petition, the grandparents said that Zion had been in their home since March 2004. "We love him and he loves and misses us. [We] should have the opportunity to present [our] side of this story to the court and to be considered for long term placement. If this motion is denied we will have no opportunity to present our case to the court. This is why we believe the [A]gency filed a [section] 388 motion instead of the [section] 387 motion as was ordered by the court."

The grandparents also attached a brief letter from their family therapists, who stated they were "greatly concern[ed] about the on-going separations of these children [Zion and his siblings] which continues to reinforce psychological instability." It is unclear whether the therapists were referring to the children's "separations" from the grandparents or from each other.[5]

The grandparents also attached a letter from a neighbor couple who stated the grandparents loved and cared for their grandchildren, and certificates of completion of a parenting class.

On August 15, the grandparents asked for de facto parent status, based on Zion's having lived with them for a year and a half, and their participation in his schooling, therapy, and daily activities.

Both the Agency and Zion's counsel opposed the grandparents' section 388 petition and their request for de facto parent status, as not being in Zion's best interests.

On September 5, the juvenile court summarily granted the Agency's section 388 petition. That same day the court summarily denied the grandparents' section 388 petition, finding the proposed modification was not in Zion's best interests. The court also denied the grandparents' request for de facto parent status.

On September 7, the court held the .26 hearing and adopted the permanent plan of Zion's adoption by his godparents, and found adoption to be in Zion's best interests. The grandparents were not present. Their counsel agreed to leave the courtroom at the outset of the hearing, after it was clarified that their section 388 petition and request for de facto parent status had been denied—and the grandparents were essentially left with their appellate remedies.[6]

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[5] The letter also is internally contradictory. It states that the grandparents "have demonstrated a loving bond" with Zion, and then states they are "*trying* to re-establish a new bond with their [grand]children." (Italics added.)

[6] Appellate counsel for Grandmother claims that counsel was "excluded" from the hearing. In fact, the Agency's counsel asked the court "if we could have Ms. Hicks [the

II. DISCUSSION

Grandmother contends that the juvenile court erred by summarily denying her section 388 petition, denying her request for de facto parent status, and summarily granting the Agency's section 388 petition.[7] We disagree because the challenged rulings were well within the sound discretion of the juvenile court.

Grandmother's Section 388 Petition

We first address the standard of review of a decision on a section 388 petition. The standard is abuse of discretion. A section 388 petition "is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion. [Citations.]" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416; see *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319 (*Stephanie M.*); *In re Zachary G.* (1999) 77 Cal.App.4th 799, 805, 808 (*Zachary G.*).)

Grandmother contends that the standard is de novo review. She is incorrect. Grandmother relies on *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, but she misreads that opinion. The court in that case applied the standard of abuse of discretion. (*Id.* at p. 1413.) Grandmother misreads a passage in which the court discussed a violation of procedural due process. (*Id.* at p. 1416.) That passage cannot be reasonably interpreted as an adoption of de novo review of rulings on section 388 petitions. In any case, we are bound by the Supreme Court cases cited above.

We now turn to the merits. Under section 388, a juvenile court may modify one of its orders if the petitioner shows, by a preponderance of the evidence, that there are (1) changed circumstances or new evidence that support a modification; and (2) the modification would be in the best interests of the child. (*Stephanie M., supra,* 7 Cal.4th at pp. 316-317; *Zachary G., supra,* 77 Cal.App.4th at p. 806.) To obtain a hearing on her section 388 petition, a petitioner needs only to make a prima facie showing of these two

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grandparents' counsel] excused." The court asked Ms. Hicks "Do you mind?" Ms. Hicks replied, "Yeah, sure," and left the courtroom.

[7] Grandfather is not a party to this appeal.

elements, and "the petition should be liberally construed in favor of granting a hearing to consider the parent's request. [Citation.]" (*Zachary G., supra,* 77 Cal.App.4th at p. 806; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310 (*Marilyn H.*).)

But the burden of showing changed circumstances is on the party seeking modification. (*Marilyn H., supra,* 5 Cal.4th at p. 309; rule 1432(f).) And "if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed [modification is in] the best interests of the child, the court need not order a hearing on the petition. [Citations.]" (*Zachary G., supra*, 77 Cal.App.4th at p. 806.)

Grandmother argues she made a sufficient showing to obtain a hearing on her petition, and the juvenile court thus erred by denying it summarily. But on appeal, Grandmother does not focus on the four items of alleged changed circumstances she set forth in her petition. Rather, she focuses on the letter from the therapists, the neighbors' letter, and the completion of parenting classes. As we have noted, the therapists' letter is ambiguous. We have carefully studied the letter, which is just over a page long, and have concluded that appellate counsel reads far more substance and significance into the text than is actually there.

Furthermore, nothing set forth by Grandmother shows any change in circumstances. As the Agency and Zion's counsel argued below, they are merely, in the words of Agency's counsel on appeal, "statements of current and accepted facts." And Grandmother failed to make a sufficient showing that the proposed modification was in the best interests of Zion.

Grandmother briefly argues the court should have granted her petition, and set aside the July 8, 2005 order (July 8 order), because it was "made in excess of jurisdiction and without proper notice." Grandmother contends the juvenile court could not have imposed extended visitation, thereby changing the prior visitation order, unless the Agency filed a section 388 petition requesting that relief.

Of course, the Agency did not file a section 388 petition requesting that relief—but Grandmother is raising this issue for the first time on appeal. In the juvenile court,

both at the July 8 hearing and in her section 388 petition, Grandmother complained that the Agency needed to file a *section 387* petition. We note that contrary to the juvenile court's understanding, no section 387 petition was required in this case because parental rights had already been terminated. (See *In re A.O.* (2004) 120 Cal.App.4th 1054, 1059-1061.) At any rate, Grandmother was present at the July 8 hearing and was able to object to the extended visitation order. She fully litigated the issues in the context of what was before the court.

We feel this argument is a smokescreen. Grandmother never asserted below that the July 8 order was invalid as in excess of jurisdiction. The gravamen of her section 388 petition was not to challenge the visitation, but to get Zion back into her home.

Grandmother's Request for De Facto Parent Status

Grandmother contends she fit the definition of de facto parent as set forth in *In re Patricia L.* (1992) 9 Cal.App.4th 61, 66, and the juvenile court erred by denying her request. We need not discuss this issue at length. Grandmother was significantly responsible for Zion being found a dependent child due to sibling abuse. As such, her conduct was inconsistent with the role of a parent and her request for de facto parent status was properly denied. (See *In re Merrick V.* (2004) 122 Cal.App.4th 235, 256-258; *In re Leticia S.* (2001) 92 Cal.App.4th 378, 381-383; *In re Michael R.* (1998) 67 Cal.App.4th 150, 156-158.)

The Agency's Section 388 Petition

Grandmother contends the juvenile court erred by summarily granting the Agency's petition. We disagree.

First, it is highly unlikely that Grandmother has standing to challenge this order, because the petition involved only the Agency and Zion. And Grandmother was not a party to the action below, but only a relative with whom Zion was placed. *Cesar v. Superior Court* (2001) 91 Cal.App.4th 1023, on which Grandmother relies, is inapplicable because in the present case parental rights have already been terminated.

Second, the parties to the action, Zion and the Agency, agreed to the proposed modification, thus eliminating the need for a hearing. (Rule 1432(d).)

Third, Grandmother argues a hearing was required to *change* the permanent plan, but the juvenile court had not finalized the permanent plan of legal guardianship with Grandmother. In essence, the court only changed the *proposed* permanent plan.

Fourth, as we discussed in the statement of facts, the section 388 petition was meritorious because it was based on changed circumstances which made the modification in the best interests of Zion.

The court did not err by summarily granting the Agency's section 388 petition.[8]

III. DISPOSITION

The orders summarily denying Grandmother's section 388 petition, denying her request for de facto parent status, and summarily granting the Agency's section 388 petition are affirmed.

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Marchiano, P.J.

We concur:

_____
Stein, J.

_____
Margulies, J.

[8] Grandmother claims the Agency failed to file a petition to terminate her legal guardianship of Zion. *But Grandmother is not, and has never been, Zion's legal guardian.* This is clear from the discussion of the record in this opinion. The fact that Grandmother is referred to as "guardian" in some minute orders and Agency reports does not indicate there was a judicial appointment of the Grandmother as guardian. We believe she is so referred to because the cases of the siblings were processed together through the juvenile court, and Grandmother was the legal guardian of Larry and A.C.